No. 96-1037

In the Supreme Court of the United States

OCTOBER TERM, 1996

KIOWA TRIBE OF OKLAHOMA, PETITIONER

v.

MANUFACTURING TECHNOLOGIES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the sovereign immunity from suit accorded to Indian Tribes as a matter of federal law bars an action brought in state court to recover money damages for a breach of contract arising out of commercial activity undertaken by the Tribe outside Indian country.

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This brief is submitted in response to the Court's invitation to the Acting Solicitor General to express the views of the United States.

STATEMENT

1. The United States entered into its first treaty with the Kiowa Nation of Indians in 1837. 7 Stat. 533. Later treaties with the Kiowa were concluded in 1853 (10 Stat. 1013), 1865 (14 Stat. 717), and 1867 (15 Stat. 581, 589). Those treaties effectively recognized the Kiowa as a domestic dependent nation and established a relationship of trust and protection between the Tribe and the United States. See *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (Indian tribes

"may * * * be denominated domestic dependent nations," whose "relation to the United States resembles that of a ward to his guardian"); cf. *Ex parte Crow Dog*, 109 U.S. 556, 571-572 (1883) (recognizing original status and rights of Indian Tribes). To this day, the United States continues to recognize the Kiowa Tribe of Oklahoma as having "the immunities and privileges available to * * * federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes." 61 Fed. Reg. 58,211, 58,213 (1996) (quoting 25 C.F.R. 83.2); see also 25 U.S.C. 479a, 479a-1.[1]

In its 1867 treaties with the Kiowa, Comanche and Apache Tribes, 15 Stat. 581, 589, the United States set aside, from the original tribal lands, well over 2,000,000 acres as a permanent reservation for the Tribes. See *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903) (describing history). Through later shifts in law and policy, however, the United States largely abrogated those treaties, and divested the Kiowa Tribe of the majority of the reserved lands, in exchange for allotments of land to individual members of the Tribe and cash compensation to be held in trust for the Tribe by the United States. *Ibid.* We are informed that the Tribe today owns approximately 1,200 acres of land in Oklahoma, much of it in scattered parcels, as well as an interest in approximately 3,000 acres of land held by the United States in trust for the Kiowa, Comanche and Apache Tribes.

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[1] We are informed that the Tribe presently has approximately 10,000 enrolled members, of whom a smaller number are actively involved in tribal affairs.

2. The record in this case is sparse. It appears that a tribal entity known as the Kiowa Industrial Development Commission entered into a letter agreement dated March 19, 1990, in which it agreed to purchase stock then held by respondent in an Oklahoma corporation known as Clinton-Sherman Aviation, Inc. See Pet. App. 2; Pet. on Prom. Note 1; Answer of Def. Kiowa Tribe 1; Def. Kiowa Tribe's Br. in Opp. to Pltf's Mot. for Summ. J. (Opp. Summ. J.) 1. On April 3, 1990, the then-Chairman of the Tribe's Business Committee signed, in the name of the Tribe, a short-term promissory note (the Note) promising to pay respondent $285,000, with interest at an annual rate of 10% in the ordinary course and 15% after any default. Judgment 1 (Oct. 30, 1995); Note 1-2 (attached as Exh. A to Pet. on Prom. Note); Opp. Summ. J. 1.

The face of the Note indicates that it was signed at Carnegie, Oklahoma, where the Tribe maintains a Tribal Complex on land held in trust for the Tribe by the United States. Note 1-2; see Mot. to Dismiss 1. Respondent's petition seeking enforcement of the Note alleges (at ¶ 2), however, that the Note was "executed and delivered to [respondent] in Oklahoma City," and petitioner does not appear to have contested that allegation. Unless otherwise directed, payments were to be made at respondent's offices in Oklahoma City. Note 1. In a paragraph entitled "Waivers and Governing Law," the Note fails to specify a particular governing law, but it explicitly provides: "Nothing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma." Note 2.

The Note called for only two payments, to be made 30 and 90 days after the Note was signed. Note 1. The Tribe did not make either payment. Judgment 1. It

further appears, from the decision in a related case, that a similar financial undertaking given by the Tribe in connection with the acquisition of additional shares of Clinton-Sherman Aviation was secured by the acquired shares, which subsequently proved to be worthless. Pet. App. 3; *Hoover* v. *Kiowa Tribe of Okla.*, 909 P.2d 59, 60 & n.3 (Okla. 1995), cert. denied, 116 S. Ct. 1675 (1996); see also *Aircraft Equip. Co.* v. *Kiowa Tribe of Okla.*, 921 P.2d 359, 360 & n.1 (Okla. 1996) (default by Tribe on assumption and guaranty of pre-existing promissory note).

3. Three years after payment was due, respondent sued the Tribe in state court seeking judgment on the Note. Pet. App. 2; Pet. on Prom. Note (filed Aug. 24, 1993). The Tribe moved to dismiss for lack of jurisdiction, in part on the ground that the Tribe had never waived its sovereign immunity from suit, and therefore could not be sued for money damages. See Pet. App. 2; Mot. to Dismiss 1. The court denied that motion (see Opp. Summ. J. 2 n.1), and the Tribe answered, again asserting its immunity from suit (Answer 2). The court granted respondent's motion for summary judgment, awarding respondent a total of $445,471 in principal and accrued interest, together with attorneys' fees and costs. Judgment 1-2.

The Oklahoma Court of Appeals affirmed. Pet. App. 1-4. The court rejected the Tribe's sovereign immunity argument on the authority of *Hoover* v. *Kiowa Tribe of Oklahoma*, *supra*, and *First National Bank in Altus* v. *Kiowa, Comanche and Apache Intertribal Land Use Committee*, 913 P.2d 299 (1996), in which the Oklahoma Supreme Court held that "a contract between an Indian tribe and a non-Indian is enforceable in state court when the contract is executed outside of Indian Country." *Hoover*, 909 P.2d at 62.

In this case, the Oklahoma Supreme Court declined discretionary review. See Pet. 2.

DISCUSSION

In this and related cases, the courts of the State of Oklahoma have asserted jurisdiction over actions for money damages brought directly against an Indian Tribe. That assertion conflicts with decisions of this Court, the federal courts of appeals, and courts of last resort in other States. Review by this Court is necessary to resolve that conflict and to correct a serious error of federal law that fails to respect the sovereign status of Indian Tribes and threatens their economic well-being.

1. In *Oklahoma Tax Commission* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991), this Court reaffirmed that "[s]uits against Indian tribes are * * * barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." That statement reflects longstanding precedent. *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 782 (1991) ("We have repeatedly held that Indian tribes enjoy immunity against suits by States."); *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978) ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."); see also *Three Affiliated Tribes* v. *Wold Eng'g*, 476 U.S. 877, 890-891 (1986); *Puyallup Tribe, Inc.* v. *Department of Game*, 433 U.S. 165, 172-173 (1977); *United States* v. *U.S. Fidelity & Guar. Co.*, 309 U.S. 506, 512 (1940); *Turner* v. *United States*, 248 U.S. 354, 358 (1919); *Thebo* v. *Choctaw Tribe*, 66 F. 372, 374-376 (8th Cir. 1895).

2. In this case, petitioner has not waived its tribal sovereign immunity. Indeed, the promissory note on which respondent sued explicitly provides that "[n]othing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma." Note 2. Nor has there been any suggestion that Congress has abrogated the Kiowa Tribe's immunity in any respect that is relevant to this case. Nonetheless, the state court of appeals held that "[a]s the law now exists in Oklahoma, there appears no doubt that the promissory note at issue may be enforced in state court, the doctrine of sovereign immunity notwithstanding." Pet. App. 4.

a. The court of appeals relied (Pet. App. 3) on the decision rendered by the Supreme Court of Oklahoma in a case with essentially identical facts, involving the Kiowa Tribe and arising out of the same transaction. *Hoover* v. *Kiowa Tribe of Okla.*, 909 P.2d 59, 60 & n.3 (1995), cert. denied, 116 S. Ct. 1675 (1996). In *Hoover*, the Oklahoma Supreme Court first noted that a state court has jurisdiction to consider the merits of a tribal sovereign immunity defense raised in litigation that is otherwise properly before the court. *Id.* at 61 (citing *Oklahoma Tax Comm'n* v. *Graham*, 489 U.S. 838 (1989)). The court then referred to its earlier decision in *Lewis* v. *Sac and Fox Tribe of Oklahoma Housing Authority*, 896 P.2d 503 (1994), cert. denied, 116 S. Ct. 476 (1995), which held (*id.* at 507-512) that the Oklahoma courts are generally empowered to decide civil cases arising within their territorial jurisdiction, whether those cases are governed by federal or state law. Although the *Lewis* court recognized that a special jurisdictional inquiry was appropriate "whenever Indian interests are tendered in a controversy," it held that "[o]nly that

litigation which is explicitly withdrawn by Congress or that which infringes upon tribal self-government stands outside the boundaries of permissible state-court cognizance." *Id.* at 508.

Lewis did not address the question of sovereign immunity, which was not asserted before the state supreme court in that case. 896 P.2d at 506 n.15, 511 & n.59; *Hoover*, 909 P.2d at 61. In deciding that issue, *Hoover* cited approvingly the New Mexico Supreme Court's decision in *Padilla* v. *Pueblo of Acoma*, 754 P.2d 845, 850-851 (1988), cert. denied, 490 U.S. 1029 (1989), which held that a New Mexico court could decide a claim brought against a Tribe by a private party alleging a breach of contract in connection with off-reservation commercial activity undertaken by the Tribe. *Hoover* adopted *Padilla*'s reasoning that a forum State's decision to recognize a Tribe's sovereign immunity from suit on claims arising within the usual territorial and subject-matter jurisdiction of the state courts was no different from the forum State's decision to accord another State immunity from claims arising out of activity undertaken by the other State within the forum State's territory. *Hoover*, 909 P.2d at 62; see *Padilla*, 754 P.2d at 850-851. Citing this Court's decision in *Nevada* v. *Hall*, 440 U.S. 410 (1979), *Padilla* held that that decision was "solely a matter of comity." 754 P.2d at 850. Because Oklahoma, like New Mexico, allows its courts to entertain suits against itself for breach of contract, *Hoover* concluded that "a contract between an Indian tribe and a non-Indian is enforceable in state court when the contract is executed outside of Indian Country." 909 P.2d at 62.

b. The Oklahoma Supreme Court reaffirmed *Hoover* in *Aircraft Equipment Co.* v. *Kiowa Tribe of*

Oklahoma (*Aircraft Equipment I*), 921 P.2d 359 (1996), another case arising (like this case and *Hoover*) out of petitioner's purchase of the shares of Clinton-Sherman Aviation (see *id.* at 360 & n.1). The dissent in *Aircraft Equipment I* (*id.* at 362-363) argued that the court's position "contravene[d] the mainstream of contemporary sovereign immunity jurisprudence" and conflicted directly with decisions of two federal courts of appeals. Although the majority acknowledged a conflict with the Tenth Circuit's decision in *Sac and Fox Nation* v. *Hanson*, 47 F.3d 1061, cert. denied, 116 S. Ct. 57 (1995), it dismissed that decision as "a federal court's pronouncement on a state law question" that "lacks the force of authority." *Aircraft Equip. I*, 921 P.2d at 361.

Pointing out that its decisions in *Lewis* and *Hoover* were based in large part on its reading of this Court's cases, the court in *Aircraft Equipment I* quoted the statement in *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148-149 (1973), that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Aircraft Equip. I*, 921 P.2d at 361-362. The court concluded that "[h]aving cited those cases [in *Hoover*], and given the fact that the Supreme Court of the United States has chosen not to grant certiorari to review either the *Hoover* or *Lewis* opinions, [the court would] decline to follow the reasoning of the 10th Circuit." *Id.* at 362.

Finally, the Oklahoma Supreme Court recently upheld the right of Aircraft Equipment Co. to enforce its state judgment against petitioner using the remedies ordinarily available to judgment creditors in state court, including invoking state judicial power to

seize tribal tax revenues. *Aircraft Equip. Co.* v. *Kiowa Tribe of Okla.*, No. 86,184, (May 6, 1997). Finding "no merit to the Tribe's argument that *Lewis*, *Hoover*, and *Aircraft [Equipment] I* are contrary to federal law," slip op. ¶ 7, the court held (again over a dissent based on tribal sovereign immunity) that any burden on petitioner was "legally permissible where the Tribe ventured outside its Indian country, engaged in commercial activity for economic gain, and created a contract controversy which was ultimately settled in [state] court" (*id.* at ¶ 10). See also *First Nat'l Bank in Altus* v. *Kiowa, Comanche and Apache Intertribal Land Use Comm.*, 913 P.2d 299, 301 (Okla. 1996) (finding *Hoover* "dispositive of the question presented").

3. The state court of appeals was therefore correct to hold (Pet. App. 4) that it was required to assert jurisdiction over petitioner in this case, "[a]s the law now exists in Oklahoma." The Oklahoma rule cannot, however, be reconciled with this Court's cases concerning tribal sovereign immunity.

a. *Oklahoma Tax Commission* v. *Citizen Band Potawatomi Indian Tribe* makes clear that tribal sovereign immunity bars an action for monetary relief, even if the action is based on a Tribe's commercial dealings with nonmembers. In *Potawatomi*, Oklahoma sought to recover $2.7 million from the Citizen Band Potawatomi Indian Tribe for taxes on cigarettes sold to nonmembers by a store owned and operated by the Tribe. See 498 U.S. at 507. This Court held that the Tribe could be required to collect state taxes on future cigarette sales to nonmembers, but that tribal sovereign immunity barred a money judgment against the Tribe for unpaid taxes on past sales. *Id.* at 509-511, 514.

In *Potawatomi*, the Court specifically refused Oklahoma's invitation "to construe more narrowly, or abandon entirely, the doctrine of tribal sovereign immunity." 498 U.S. at 510. The State argued that "tribal business activities * * * are now so detached from traditional tribal interests that the tribal-sovereignty doctrine no longer makes sense," and that the doctrine therefore "should be limited to the tribal courts and the internal affairs of tribal government." *Ibid.* In rejecting that argument, the Court observed that Congress "has always been at liberty to dispense with * * * tribal immunity or to limit it," and "has occasionally authorized limited classes of suits against Indian tribes," but that it has never authorized actions to enforce tax assessments, and has "consistently reiterated its approval of the immunity doctrine." *Ibid.*[2] The Court concluded that, although

[2] Congress has provided for suits against Indian Tribes in connection with commercial activities under certain limited circumstances, which are not alleged to obtain in this case. In the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. 461 *et seq.*, Congress authorized most Tribes to adopt constitutions for the conduct of their governments (IRA § 16, 25 U.S.C. 476) and to receive separate charters of incorporation to enable them to engage in business activities through separate entities (IRA § 17, 25 U.S.C. 477). The Oklahoma Indian Welfare Act (OIWA), ch. 831, § 3, 49 Stat. 1967 (1936), authorizes Oklahoma Tribes to adopt constitutions and to receive corporate charters equivalent to those issued under the IRA. 25 U.S.C. 503. Charters of incorporation issued under Section 17 of the IRA often contain a clause expressly allowing the corporation to sue or be sued. Similarly, the OIWA authorizes any ten or more individual Oklahoma Indians to form a cooperative association chartered by the Secretary of the Interior, and the Act expressly provides that such an association "may sue and be sued" in state or federal court. 25 U.S.C. 504-505. Some courts have construed "sue or be sued" clauses in IRA charters to waive the immunity of the incorporated entity from suit. See, *e.g.*, *Weeks Constr., Inc.* v. *Oglala Sioux Hous. Auth.*, 797 F.2d 668, 671 (8th Cir. 1986). Any such waiver is limited, however, to the business dealings and assets of the corporation, and does not extend to the Tribe in its sovereign capacity. See, *e.g.*, *Seneca-Cayuga Tribe of Okla.* v. *Oklahoma ex rel. Thompson*, 874 F.2d 709, 715 n.9 (10th Cir. 1989); *Ramey Constr. Co.* v. *Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 320 (10th Cir. 1982). Indeed, the absence of any similar authorization (by charter or statute) to sue the tribal governments organized under Section 3 of the OIWA (or Section 16 of the IRA) reinforces the conclusion that those governments remain protected by the established rule of sovereign immunity. In this case, the promissory note on which respondents sued was signed in the name of the Tribe by the chairman of its governing Business Committee, and there is no question of waiver because the Note specifically reserved the Tribe's "sovereign rights." Note 2; Opp. Summ. J. 1.

the State might have alternative methods of collecting the taxes at issue, there was "no doubt that sovereign immunity bar[red] the State from pursuing the most efficient remedy" by bringing suit directly against the Tribe. *Id.* at 514.

b. The Oklahoma Supreme Court's decisions denying immunity to petitioner rely heavily on the fact that the transaction giving rise to this litigation was evidently negotiated, and the relevant documents were allegedly signed, within the State's territorial jurisdiction and not on land held by or for the Tribe or its members. See, *e.g.*, *Hoover*, 909 P.2d at 61-62. This Court has previously refused to draw such a distinction for purposes of tribal sovereign immunity from suit. In *Puyallup Tribe, Inc.* v. *Department of Game*, a Tribe challenged a state court's judgment that asserted "jurisdiction to regulate the fishing activities of the Tribe both on and off its reservation."

433 U.S. at 167. This Court held that a claim of sovereign immunity was "well founded" to the extent that it was "advanced on behalf of the Tribe, rather than the individual [Indian] defendants." *Id.* at 167-168; see *id.* at 172-173. Accordingly, the Court held that "the portions of the state-court order that involve[d] relief against the Tribe itself must be vacated in order to honor the Tribe's valid claim of immunity." *Id.* at 173. In reaching that conclusion, the Court did not distinguish the Tribe's activities on reservation land from those occurring elsewhere, observing simply that, "[a]bsent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe." *Id.* at 172.

The Oklahoma Supreme Court relied on cases such as *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973), and *Organized Village of Kake* v. *Egan*, 369 U.S. 60 (1962). See *Hoover*, 909 P.2d at 61 (quoting *Mescalero* and *Kake*); *Aircraft Equip. I*, 921 P.2d at 361-362 & n.2 (same). Those cases hold that a State may have authority to tax or regulate Tribes or individual Indians who engage in conduct (such as operating a ski resort, as in *Mescalero*, or fishing, as in *Kake*) within the State but outside Indian country. As *Potawatomi* makes clear (see 498 U.S. at 514), however, there is a difference between the right to demand compliance with state law and the means that may be available to enforce such compliance. Neither *Mescalero* nor *Kake* discusses enforcement, or mentions tribal immunity from suit. This Court's later decisions in *Potawatomi* and *Puyallup* address those issues, and they hold that neither a valid state tax nor a valid state fishing regulation may be enforced in a suit brought directly against an affected Tribe.

c. This Court's decision in *Nevada* v. *Hall*, 440 U.S. 410 (1979), is not to the contrary. In that case, the California courts asserted jurisdiction over the State of Nevada, based on conduct by a Nevada agent within California's territorial jurisdiction. The Court noted that, in the absence of any other source of controlling federal law, any restriction on California's judicial power would have to be found in the federal Constitution. See *id.* at 414 & n.5. The Court held, however, that the constitutional compact generally leaves each State free to decide, as a matter of policy and comity, whether and on what terms to accord its sister States immunity from suit in its courts. *Id.* at 418-427.

Indian Tribes, however, "are not States, and the differences in the form and nature of their sovereignty make it treacherous" to reason too quickly by analogy. *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 143 (1980); see also *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 15-20 (1831) (Tribes are neither "States" nor "foreign States" for purposes of Article III, but "may, more correctly, perhaps, be denominated domestic dependent nations"); compare *Blatchford*, 501 U.S. at 781-782 (a Tribe may not sue a State in federal court, as another State might do; the mutual cession of jurisdiction by the States to the federal sovereign does not apply to suits by or against Tribes, "as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties"). Unlike the two States involved in *Nevada* v. *Hall*, the State of Oklahoma and the Kiowa Tribe involved in this case are both subject to a body of federal constitutional, statutory, and common law that controls the question of tribal sovereign immunity.

As "domestic dependent nations" (*Potawatomi*, 498 U.S. at 509, quoting *Cherokee Nation*, 30 U.S. (5 Pet.) at 17), the Tribes "occupy a unique status under our law" (*National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U.S. 845, 851 (1985)). See also, *e.g.*, *United States* v. *Wheeler*, 435 U.S. 313, 322-323 (1978); *Morton* v. *Mancari*, 417 U.S. 535, 551-552 (1974); *United States* v. *U.S. Fidelity & Guar. Co.*, 309 U.S. at 512-513. Although the Tribes "retain some of the inherent powers of the self-governing political communities that were formed long before Europeans first settled in North America" (*National Farmers Union Ins. Cos.*, 471 U.S. at 851), their right to self-government "is ultimately dependent on and subject to the broad power of Congress" (*White Mountain Apache*, 448 U.S. at 143). See also, *e.g.*, *Escondido Mut. Water Co.* v. *La Jolla Band of Mission Indians*, 466 U.S. 765, 787 n.30 (1984); *Wheeler*, 435 U.S. at 323. On the other hand, Congress has recognized that "the United States has a trust responsibility * * * that includes the protection of the sovereignty of each tribal government." 25 U.S.C. 3601(2).[3] Consistent with that policy, Congress has not abrogated, but rather has confirmed, the sovereign immunity of Indian Tribes from suit. See 25 U.S.C. 450n (nothing in the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450 *et seq.*, which establishes a

[3] See also, *e.g.*, Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. No. 104-330, § 2(3), 110 Stat. 4017 (to be codified at 25 U.S.C. 4101(3)) ("[T]he Constitution of the United States invests the Congress with plenary power over the field of Indian affairs, and through treaties, statutes, and historical relations with Indian tribes, the United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indian people.").

framework of financial assistance for Tribes, is to be construed as "affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe"). As a matter of both plenary power and special responsibility, the legal status of the Indian Tribes—including their immunity from suit—is a matter of federal law.

These bedrock principles of federal law, and the vesting of plenary power over Indian affairs in the United States rather than in the States, establish that the immunity of a Tribe from suit in state court is not a mere matter of "comity" for each State to decide, unlike in *Nevada* v. *Hall*.[4] Congress could, of course, if it chose, render the Tribe amenable to suit in state court on commercial contracts signed outside of Indian country. But it has not done so. In the absence of affirmative congressional action, or consent by the Tribe, the rule of this Court's cases is that the Tribe is immune from suit for money damages.

4. As the Oklahoma Supreme Court has acknowledged (*Aircraft Equip. I*, 921 P.2d at 361-362), Oklahoma's assertion of jurisdiction over damage suits against petitioner arising out of its commercial activities outside Indian country conflicts directly with the Tenth Circuit's decision in *Sac and Fox Nation* v. *Hanson*. In *Hanson*, the federal court of appeals affirmed the entry of an injunction against Oklahoma state court proceedings that sought money damages or indemnification from an Indian Tribe on the basis

[4] Similarly, the amenability of a foreign nation to suit in state court is a matter of federal law, to be determined by the political Branches in the exercise of their plenary powers over foreign affairs. See 28 U.S.C. 1604; *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486-489, 493, 497 (1983).

of contractual and statutory claims arising out of a tribal business venture outside the Tribe's own territory. See 47 F.3d at 1065 ("Without an explicit waiver, the Nation is immune from suit in state court—even if the suit results from commercial activity occurring off the Nation's reservation.").[5]

Hanson is consistent with this Court's cases concerning tribal sovereign immunity, and with the decisions of most other appellate courts that have considered the matter of state-court jurisdiction over suits against Tribes. See *Gavle* v. *Little Six, Inc.*, 555 N.W.2d 284, 290 (Minn. 1996) (immunity from damage suit arising from operation of casino, where alleged acts took place both within and outside Indian country), petition for cert. pending, No. 96-1215 (filed Jan. 29, 1997); *North Sea Prods., Ltd.* v. *Clipper Seafoods Co.*, 595 P.2d 938, 941 (Wash. 1979) (Tribe did not waive its immunity from state garnishment action by engaging in commercial conduct off the reservation); *Morgan* v. *Colorado River Indian Tribe*, 443 P.2d 421, 423-424 (Ariz. 1968) (immunity from suit for damages arising from accident at

[5] The state supreme court incorrectly characterized *Hanson* as "a federal court's pronouncement on a state law question." *Aircraft Equip. I*, 921 P.2d at 361. As we have explained, the question of tribal immunity from suit is one of federal law. The state court is generally correct, however, that it has concurrent (rather than subordinate) jurisdiction over many questions of federal law, including the question of state-court jurisdiction in the face of a claim of tribal immunity. See generally *Lewis*, 896 P.2d at 507-509; *Oklahoma Tax Comm'n* v. *Graham*, *supra*. That is why the conflict between the decisions is equivalent to a conflict in the courts of appeals for purposes of this Court's discretionary review. See *DeCoteau* v. *District County Court*, 420 U.S. 425, 430-431 (1975).

amusement park operated by Tribe outside its reservation); see also *Elliott* v. *Capital Int'l Bank & Trust, Ltd.*, 870 F. Supp. 733, 735 (E.D. Tex. 1994) (immunity where officer of bank chartered and owned by Tribe allegedly defrauded plaintiff outside Indian country), aff'd, 102 F.3d 549 (5th Cir. 1996) (Table); but see *Padilla* v. *Pueblo of Acoma*, *supra*. The Oklahoma decisions rejecting *Hanson* and adopting the reasoning of the New Mexico Supreme Court in *Padilla* v. *Pueblo of Acoma* have deepened a preexisting conflict on this issue. See *Pueblo of Acoma* v. *Padilla*, 490 U.S. 1029 (1989) (White, J., dissenting from denial of certiorari); *DeFeo* v. *Ski Apache Resort*, 904 P.2d 1065, 1069 (Ct. App.) (recognizing inconsistency between *Padilla* and federal decisions), cert. denied, 903 P.2d 844 (N.M. 1995) (Table). That ripe and square conflict distinguishes the situation in this case from that in *Richardson* v. *Mt. Adams Furniture*, 980 F.2d 590 (1992), cert. denied, 510 U.S. 1039 (1994), in which we suggested (92-1398 U.S. Br. at 14-19) that the Court deny review of the Ninth Circuit's decision on a similar issue (tribal immunity from suit by a bankruptcy trustee against a tribal business to set aside a transfer that occurred outside Indian country).

The conflict is, moreover, one that warrants resolution by this Court. Because Oklahoma is within the Tenth Circuit, Tribes are now subject to conflicting rules on a fundamental legal question of tribal amenability to suit. When a Tribe is sued in state court, the Anti-Injunction Act (28 U.S.C. 2283), principles of federal abstention, and the lower federal courts' lack of jurisdiction to review final state judgments (see Pet. App. 11-13) will stand as significant barriers to a Tribe's ability to gain vindication of its federal rights

in federal court.[6] Oklahoma Tribes (and other Tribes doing business in Oklahoma) are therefore largely deprived of the immunity guaranteed to them by federal law; and neither Tribes nor their potential commercial counterparties can be certain what law will apply to prospective contractual arrangements.

Finally, as the state supreme court's most recent *Aircraft Equipment* decision underscores, the state courts' holdings leave petitioner subject to attachment or garnishment of tribal tax revenues or other tribal funds. Such attachment represents a significant interference with the Tribe's essential governmental functions. In addition, as petitioner points out (Pet. 13), the practical difficulty of separating tribal funds from federal program funds provided by the United States for administration by the Tribe—which are unquestionably immune from garnishment—has already led to direct and material interference with federal programmatic interests.[7]

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[6] In *Hanson*, the court declined to consider the effect of the Anti-Injunction Act on the ground that the defendant had waived reliance on that Act by failing to raise it in the district court. 47 F.3d at 1062-1063.

[7] With respect to the immunity of property in which the United States has an interest, see generally *Maricopa County* v. *Valley Nat'l Bank*, 318 U.S. 357, 362 (1943); *United States* v. *Alabama*, 313 U.S. 274, 282-283 (1941); *Henry* v. *First Nat'l Bank of Clarksdale* v. *Mississippi Action for Progress, Inc.*, 595 F.2d 291, 308-309 (5th Cir. 1979), cert. denied, 444 U.S. 1074 (1980). The United States Attorney's Office for the Western District of Oklahoma has already been directly and substantially involved in two separate actions, removed by the United States to federal court, seeking to gain the release of federal program funds improperly frozen by local banks in response to state court orders issued to enforce the judgments in the *Hoover* and *Aircraft Equipment* actions. *Carl E. Gungoll Exploration Joint Venture* v. *Kiowa Tribe of Okla.*, No. CIV-96-2059-T (W.D. Okla.) (awaiting stipulation as to separation of federal and tribal funds); *Hoover* v. *Kiowa Tribe of Okla.*, No. CIV-96-1624-L (W.D. Okla.) (motion to remand to state court pending).

These consequences are incompatible with the special protection afforded Indian Tribes under federal law, and with "Congress' desire to promote the goal of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency and economic development." *Potawatomi*, 498 U.S. at 510 (internal quotation marks omitted). This Court should therefore grant review of the Oklahoma courts' "doubtful determination of [this] important question of state power over Indian affairs." *Williams* v. *Lee*, 358 U.S. 217, 218 (1959).[8]

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[8] We note that the pending certiorari petition in *Citizen Potawatomi Nation* v. *C&L Enterprise, Inc.*, No. 96-1721 (filed Apr. 25, 1997), presents essentially the same question as this case, while the petition in *Gavle* v. *Little Six, Inc.*, No. 96-1215 (filed Jan. 29, 1997), presents similar questions concerning the immunity of a business corporation owned by a Tribe and organized under tribal law. The interposition of a corporate entity in No. 96-1215 somewhat complicates the immunity issue in that case; and in No. 96-1721, the issue of waiver is clouded by the existence of a potentially unclear choice-of-law clause. See 96-1721 Pet. App. at 23 ("Project" defined as building to be constructed); *id.* at 46 (contract governed by "law of the place where the Project is located"); 96-1721 Pet. at 4 n.2 (building located on "restricted Indian land" owned by the Tribe). This case thus appears to be the better vehicle for resolution of the conflict among state and federal courts on the immunity question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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